Goya Foods, Inc., d/b/a Goya Foods of Florida *and* Southern Regional Joint Board, Workers United a/w SEIU. Cases 12–CA–019668, 12–CA–019765, 12–CA–019779–1, 12–CA–019945, 12–CA–019962, 12–CA–020041, 12–CA–020099–1, 12–CA–020127, 12–CA–020233–1, 12–CA–020233–2, 12–CA–020256, 12–CA–020426, 12–CA–020496, 12–CA–020542, and 12–CA–020570

May 17, 2012

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On March 21, 2011, Administrative Law Judge Margaret G. Brakebusch issued the attached Supplemental Decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Supplemental Decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to remand the proceeding to the Regional Director for Region 12 for further appropriate action.

The question presented in this compliance proceeding is whether the judge correctly rejected private settlement agreements between the Respondent and two discriminatees where the settlements, in addition to other terms, required the discriminatees to "not engage in any union activity relating to GOYA and/or its employees." We affirm the judge's rejection of these settlements.

I. BACKGROUND

As explained in the judge's Supplemental Decision, in 1999, the Respondent unlawfully discharged two employees, Jesus Martin and Alberto Turienzo.[2] In 2006, the Board ordered the Respondent to offer Martin and Turienzo full reinstatement and to make them whole, with interest, for any loss of earnings and other benefits.[3]

During the compliance investigation that followed the Board's decision, the Respondent for the first time produced private settlement agreements that had been drafted by the Respondent's counsel and signed by Martin and Turienzo in October 2000, between the close of the underlying merits hearing and the issuance of Administrative Law Judge Lawrence W. Cullen's recommended decision on the merits. The settlements provided that, in exchange for payments ($25,000 for Martin and $22,000 for Turienzo), Martin and Turienzo waived all claims against the Respondent, including their right to further backpay and reinstatement pursuant to a Board order. In addition, the settlements required Martin and Turienzo not to apply for employment with the Respondent at any time and to "not engage in any union activity relating to GOYA and/or its employees."

In response, the Acting General Counsel issued a compliance specification seeking an order rejecting those private settlements. The judge granted the Acting General Counsel's request, finding, based on the multifactor analysis articulated in *Independent Stave Co.*, 287 NLRB 740 (1987), that the settlements were repugnant to the policies and purposes of the Act. We affirm the judge's finding for the following reasons.

II. THE PROHIBITION ON UNION ACTIVITY INVALIDATES THE SETTLEMENTS

The requirement that Martin and Turienzo refrain from engaging in any union activity relating to the Respondent or its employees, standing alone, warrants setting aside the settlements. In *Ishikawa Gasket America, Inc.*, the Board found that the employer violated Section 8(a)(1) of the Act by entering into a separation agreement with an employee under which the employee agreed not to "attempt to hire, influence, or otherwise direct any employee of the Company to leave employment of the Company or to engage in any dispute or work disruption with the Company, or to engage in any conduct which is contrary to the Company's interests in remaining union-free."[4] The Board reasoned that the separation agreement was overly broad because it forced the employee to prospectively waive her Section 7 rights.[5] As the Board explained, "[F]uture rights of employees as well as the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's Supplemental Decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] *Goya Foods of Florida*, 347 NLRB 1118, 1119, and 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008).

[3] Id. at 1124–1125.

[4] 337 NLRB 175, 175–176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[5] Id.

rights of the public may not be traded away in this manner."[6]

Here, the Respondent's settlements with Martin and Turienzo purport to indefinitely prohibit them from engaging in any union activity relating to the Respondent or its employees.[7] As in *Ishikawa Gasket*, we will not approve a settlement agreement that prospectively waives employees' Section 7 rights in such a manner.[8] That reason alone suffices for us to find the settlements void and reject them in their entirety.[9]

III. THE SETTLEMENTS ALSO FAIL UNDER INDEPENDENT STAVE

Alternatively, we reject the settlements, as the judge did, under a traditional *Independent Stave* analysis. Under *Independent Stave*, the Board assesses whether approving a non-Board settlement agreement would effectuate the purposes and policies of the Act, based on considerations including: (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements.[10]

We agree with the judge that the first *Independent Stave* factor (whether all parties have agreed to be bound) militates against approving the settlements. Although the Respondent and the discriminatees have agreed to be bound, both the Acting General Counsel and the Charging Party oppose the settlements. In addition, we find it appropriate to accord particular weight to the Acting General Counsel's opposition in this case both because of the Respondent's 11th hour revelation of the settlements[11] and because of the provision forbidding Martin and Turienzo from engaging in any union activity relating to the Respondent or its employees. The latter provision directly implicates the Acting General Counsel's duty to protect the public interest in the enforcement of the Act, here by ensuring employees' free exercise of their Section 7 rights.[12]

Similarly, we agree with the judge that the second *Independent Stave* factor (the reasonableness of the settlements) also weighs against accepting the settlements. As just discussed, the "yellow dog" provision in the settlements is patently unreasonable.[13]

Further, we find, as did the judge, that the third *Independent Stave* factor (the presence of fraud, coercion, or duress) cuts against the settlements as well. Specifically, we adopt the judge's finding that the Respondent induced Martin and Turienzo to sign the settlement agreements by falsely telling them, before Judge Cullen had issued his merits decision, that the Charging Party had lost the case.[14]

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[6] Id. at 176 (internal quotation marks omitted) (quoting *Mandel Security Bureau Inc.*, 202 NLRB 117, 119 (1973)).

[7] We reject, as did the judge, the Respondent's claim that the parties intended the prohibition on "union activity" to prohibit Martin and Turienzo only from disparaging the Respondent. When construing contracts, including settlements, the Board looks to the parties' objective intent, as expressed in the unambiguous language of the contract. E.g., *B & K Builders*, 325 NLRB 693, 694 (1998); see *Halsted Communications*, 347 NLRB 225, 225 (2006) (construing an election stipulation). The broad phrase "union activity" clearly and unambiguously encompasses more than mere disparagement of the Respondent.

[8] "The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law." *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992).

[9] In affirming the judge, Member Hayes relies solely on the unlawful inclusion of language purporting to waive the discriminatees' rights to engage in future Sec. 7 activities as the basis for setting aside the private settlement agreements. Inclusion of this unlawful language rendered the settlement agreements void at their inception. See *Ishikawa Gasket America, Inc.*, supra. He therefore finds it unnecessary to pass on the judge's *Independent Stave* analysis or her ruling revoking the subpoena issued to former Board Agent Ross. Consequently, Member Hayes does not join part III of this Supplemental Decision.

[10] 287 NLRB 740, 743 (1987).

[11] See *Beverly California Corp.*, 329 NLRB 977, 986 (1999).

[12] See *Clark Distribution Systems*, 336 NLRB 747, 750–751 (2001) (according considerable weight to the General Counsel's opposition and finding that the settlements were part of a broader strategy to eliminate union supporters); *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998) (finding that the need to vindicate the public interest outweighed the private parties' desire to settle the litigation).

[13] We therefore find it unnecessary to pass on the judge's conclusion that the monetary amounts paid to Martin and Turienzo were unreasonable given the stage of the litigation or the judge's conclusion that the settlements' failure to address nonmonetary remedies was unreasonable.

[14] We affirm the judge's ruling granting the Acting General Counsel's petition to revoke the Respondent's subpoena to former Board Agent Arturo Ross. Contrary to the Respondent, the facts of this case are distinguishable from the "cumulative effect" of the rare concurrence of factors present in *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 733 (D.C. Cir. 1983). There, because the Board was party to an election stipulation, the Board agent's understanding of an ambiguous term in the stipulation had "unique value." Id. By contrast, Ross' testimony would be relevant only to the factual question of whether the Respondent had told Martin and Turienzo that the Charging Party had lost the unfair labor practice case. Other witnesses were available to testify on that question, and the judge was able to, and did, appropriately resolve the matter by making a credibility determination. Thus, there were no unusual circumstances here requiring the judge to contravene the Board's "strong and long-standing policy against Board employees appearing as witnesses in Board proceedings." See *Laidlaw Transit, Inc.*, 327 NLRB 315, 316 (1998).

In any event, the judge's ruling was at most harmless error because, in light of the overwhelming weight of the other factors, we would set

Finally, we find, contrary to the judge, that the fourth *Independent Stave* factor (an employer's history of violating the Act) also favors rejecting the settlements. By the time Martin and Turienzo executed the settlements, the Respondent had already engaged in a laundry list of misconduct, which the Board later found violated the Act in 22 different respects.[15] Martin and Turienzo thus agreed to the settlements in an atmosphere of serious, unremedied unfair labor practices. In these circumstances, we find that the Respondent's violations weigh against accepting the settlements.

IV. CONCLUSION

The settlements produced by the Respondent are repugnant to the purposes and policies of the Act. Accordingly, we reject them in their entirety.

ORDER REMANDING

IT IS ORDERED that this proceeding is remanded to the Regional Director for Region 12 for further appropriate action.

Dated, Washington, D.C. May 17, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Susy Kucera, Esq., for the General Counsel.
David C. Miller, Esq., *James Crosland*, Esq., and *Carlos Ortiz, Esq.,* for the Respondent.
Rodolfo Chavez, Business Agent, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This matter arises out of a compliance specification and notice of hearing issued on June 30, 2010, against Goya Foods of Florida, Inc. (Goya or Respondent) I conducted a trial in Miami, Florida, on January 11 and 12, 2011, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Goya, I find and conclude as follows

I. FINDINGS OF FACT

A. Background

On September 16, 1998, the Union of Needletrades, Industrial and Textile Employees, AFL–CIO–CLC and also known as UNITE (the Union) initiated unfair labor practice charges against Goya Foods of Florida (Goya[1]). On April 18, 2000, the Regional Director for Region 12 of the National Labor Relations Board (the Board) issued a consolidated complaint against Goya, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act.)

A 13-day unfair labor practice hearing was held in June 2000 before Administrative Law Judge (ALJ) Lawrence W. Cullen concerning these allegations. On February 22, 2001, ALJ Cullen issued his decision. As a part of his decision, the ALJ found that Goya unlawfully terminated employees Alberto Turienzo (Turienzo), Jesus Martin (Martin), and Humberto Galvaz (Galvez) on July 7, 1999, because they participated in a union rally on June 30, 1999. The ALJ found that the employees were engaged in protected concerted activities under Section 7 of the Act and recommended their immediate reinstatement with full backpay. ALJ Cullen also found that Goya unlawfully suspended and reduced the earnings of employee Reinaldo Bravo.

On August 30, 2006, the Board affirmed the decision of ALJ Cullen, finding that Goya committed numerous violations of Section 8(a)(1), (3), and (5) and ordered Goya to cease and desist from engaging in 22 separate unlawful acts. Specifically, the Board found that President Mary Ann Unanue and other Goya managers informed employees that it would be futile for them to select or continue to support a union because Goya would never recognize or negotiate with it; interrogated employees about their union membership, activities, and sympathies; promised to relieve employees of disagreeable assignments, solicited grievances and promised to adjust grievances if employees ceased supporting the Union; threatened employees with elimination of jobs, subcontracting of work, underemployment, closing of the Company, moving Goya's operations out of State, loss or reduction of pension, and assaults on union representatives, if the employees engaged in union activities. The Board also found that Goya ordered employees not to wear union paraphernalia; requested employees to ascertain and disclose to Goya the union membership and activities of other employees; and told employees that it would not recognize the authority of employees designated by the Union to represent them. The Board further found that Goya's unilateral changes in drivers' routes, salesmen's store assignments, radio phone policy, its increased use of temporary drivers, and its refusal to recognize union-designated representatives were the types of

aside the settlements even in the absence of any fraud. See *Universal Laundries & Linen Supply*, 355 NLRB 88, 88 fn. 3 (2010) (judge's ruling excluding testimony was, at most, harmless error where it would not affect the Board's conclusion).

[15] See *Goya Foods of Florida*, 347 NLRB at 1124.

[1] Because Goya Foods of Florida is a d/b/a entity of Goya Foods, Inc., both entities are referred to as "Goya" unless otherwise specified.

violations that were likely to have a lasting and negative impact on employees' support for the Union. Furthermore, the Board found that Goya violated Section 8(a)(5) of the Act by withdrawing recognition from the Union as the representative of its warehouse employees, drivers, and sales and merchandising employees.[2] As a part of its 2006 decision, the Board also found that Goya unlawfully terminated Turienzo, Martin, and Galvaz and unlawfully suspended and reduced the earnings of Bravo. Affirming the judge's decision, the Board ordered Goya to reinstate Turienzo, Martin, and Galvez with full backpay[3] and to make whole Bravo for lost wages. The Board agreed with the judge that an affirmative bargaining order was warranted.

On April 24, 2008, the United States Court of Appeals for the Eleventh Circuit issued its decision affirming and enforcing the Board's decision.[4] Although Goya argued that the court should remand the case to the Board for additional analysis, the circuit found that there was ample evidence to support the Board's findings, including the bargaining order. The court concluded that the findings of fact by the ALJ and the Board were unassailable. While the court noted that the Board's delay in ruling was of considerable concern, the court also stated: "the peculiar posture of this case and the particularly egregious nature of Goya's unfair labor practices persuade us that enforcement of the Board's order should not be denied in this case."

[2] I also take judicial notice of the fact that the Regional Director for Region 12 of the Board issued a complaint against Goya on September 27, 2002, alleging additional violations of Sec. 8(a)(5) of the Act. Based upon that complaint, ALJ George Carson II issued a decision finding that Goya violated the Act by making various unilateral changes in terms and conditions of employment without notice to or bargaining with the Union. In its decision of August 23, 2007, the Board adopted the judge's decision and found that Goya made unilateral changes in violation of Sec. 8(a)(5) of the Act. The Board noted that in its earlier decision in 347 NLRB 1118 (2006), it had found that Goya unlawfully withdrew recognition from the Union and it had ordered Goya to recognize and bargain with the Union. Thus, in light of that earlier decision, the Board rejected Goya's assertion that it had no statutory obligation to bargain with the Union concerning its unilateral changes and found that Goya violated Sec. 8(a)(5) and (1) of the Act. *Goya Foods of Florida,* 350 NLRB 939 (2007). I also take judicial notice of the Board's subsequent decision in 351 NLRB 94 (2007), in which the Board found that Goya unilaterally changed terms and conditions of employment in April and May 2001 in violation of Sec. 8(a)(5). Respondent's petition for review was denied and enforcement was granted by the D.C. Circuit in 2009. *Goya Foods, Inc., v. NLRB,* 309 Fed. Appx. 422 (D.C. Cir. 2009). On July 25, 2008, the Board issued a decision finding that Goya violated the Act by unilaterally changing pension plans on two occasions and by refusing to provide information to the Union. The Board also found that Goya unlawfully informed employees that union employees were not eligible to participate in its 401(k) plan. *Goya Foods of Florida,* 352 NLRB 884 (2008). In taking judicial notice of subsequent Board decisions dealing with unfair labor practice charges other than those involved in this matter, I do not take judicial notice of the record evidence contained therein. I simply note the subsequent proceedings and Board decisions for historical completeness.

[3] *Goya Foods of Florida*, supra.

[4] *NLRB v. Goya Foods of Florida,* 525 F.3d 1117 (11th Cir. 2008).

B. Parties' Positions

The Acting General Counsel alleges that in October 2000, Goya executed private settlement agreements with Martin and Turienzo, providing for monetary remuneration without reinstatement. The compliance specification and notice of hearing specifically alleges that Goya made false and/or misleading statements to Martin and Turienzo about the status of the unfair labor practice proceedings and misrepresented to them that they had lost their cases before the ALJ. Furthermore, the Acting General Counsel alleges that in doing so, Goya engaged in fraudulent tactics intended to improperly influence Martin and Turienzo into accepting the terms and conditions of the private settlements.

The Acting General Counsel also asserts that neither the Charging Party Union nor the General Counsel was a party to the private settlements. It is further alleged that the private settlement agreements contain provisions that are contrary to the purposes of the Act. Accordingly, the Acting General Counsel submits that given the nature of the alleged violations, Goya's extensive related unfair labor practices, the inclusion of provisions in the private settlement agreements that are contrary to the purposes of the Act, the manner in which the settlement agreements were negotiated, and the absence of agreement by the Charging Party Union or the General Counsel to be bound or to recommend approval of the private settlements, the private settlements do not serve as waivers of reinstatement or serve to toll backpay.

The Acting General Counsel seeks an order rejecting the private settlement agreements in their entirety and a finding that the agreements are repugnant to the purposes and policies of the Act and the Agency's mission and responsibility to enforce the law in the public interest. The Acting General Counsel further seeks an order requiring Goya to immediately and properly reinstate Martin and Turienzo and to make them whole for any backpay owed to them for the entire period since July 7, 1999.

Goya does not dispute that it entered into the private settlement agreements with Martin and Turienzo. It asserts, however, that Turienzo and Martin initiated the settlement discussions with Goya and that the principal terms of the agreements were suggested by Turienzo and Martin. Goya further asserts that provisions of the agreements were not intended to impose restrictions that would contravene the purposes of the Act.

C. Issues

As shown by the position of the parties, the primary issue in this matter involves the validity of the private settlement agreements entered into by Goya and these two employees in the absence of the General Counsel or the Charging Party Union. Because the agreements are written, the terms and conditions of the settlement are undisputed. The matters in dispute include: (1) the circumstances as to how the agreements came into existence; (2) the substance of Goya's communication to Turienzo and Martin prior to the execution of the settlement agreements; and (3) the meaning of the terms of the agreements.

D. The Private Settlement Agreements

It is undisputed that on October 4, 2000, Jesus Martin signed four separate documents; two in English and two in Spanish. One document was captioned "Full Waiver of All Claims, General Release, and Confidential Settlement Agreement" and the document was prepared in both English and Spanish. Both the English and Spanish copies of the document were also signed by Robert Unanue representing Goya Foods, Inc. Francisco Unanue signed the documents as a witness to both Robert Unanue's signature and Jesus Martin's signature. On the same day, Martin also signed a document captioned "Waiver of Reinstatement and Settlement of Receipt of Full Backpay." The document provided that Martin waived reinstatement with Goya and that he had received $25,000; which was asserted to be 100 percent of the backpay owed him pursuant to the Board's case. This document was also prepared in both English and Spanish. On October 31, 2000, Alberto Turienzo signed an agreement consisting of four separate documents that contained the same language as those signed by Martin, except that Turienzo's agreement provided for his receipt of $22,000. As with the agreement signed by Martin, Robert Unanue signed the documents on behalf of Goya Foods, Inc. and Francisco Unanue signed the documents as a witness to the signatures of Turienzo and Robert Unanue.

Both of the settlement agreements signed by Martin and Turienzo contained the same textual language; only the monetary amounts varied. Martin received $25,000 and Turienzo received $22,000. The agreements provided that in exchange for the monetary amount, the individuals agreed that the amount paid to them was all that they were entitled to receive from Goya as settlement of any and all claims against Goya, including, but not limited to, reinstatement and/or backpay pursuant to the Board case that had been filed on their behalf. In receipt of the monetary amount, Martin and Turienzo were required to acknowledge that the money paid to them was consideration to which they were not already entitled. By signing the agreement and accepting the monetary amount, the employees waived all rights and claims due them under the Board as well as any other Federal, State, or local government agency or department, or any labor organization. Furthermore, in exchange for the money paid to them, Martin and Turienzo agreed that they would not engage in any union activity relating to Goya and/or its employees. Martin and Turienzo also agreed that they would not at any time apply for or seek employment with Goya and that they would not disclose or discuss the terms of the agreement. Martin and Turienzo signed the agreements in both English and in Spanish.

There is no dispute that the General Counsel and the Union were not parties to these agreements. Both Robert Unanue and Francisco Unanue admitted that they did not inform either the Union or the General Counsel of the agreements and they were unaware of any other company officials who did so.

E. Witnesses Testifying in this Proceeding

1. Witnesses for the Acting General Counsel

Born in Cuba, Alberto Turienzo's native language is Spanish. Using an interpreter, he testified that he understands and speaks only "a little bit" of English. Turienzo began working for Goya Foods of Florida in 1986 as a night-shift stocker. In 1987, he became a forklift driver and worked for Goya until his discharge in 1999. Jesus Martin was also born in Cuba. Martin worked as a forklift driver for Goya for approximately 12 to 13 years. He does not speak or understand English. Both Turienzo and Martin's testimony were given via an interpreter.

Both Turienzo and Martin were terminated by Goya on July 7, 1999, after participating in a union rally on June 30, 1999. As referenced above, the Board found that Turienzo and Martin were unlawfully terminated for engaging in protected concerted activity by soliciting support regarding the Union's campaign against Goya's health and safety practices. ALJ Cullen noted in his decision that the purpose of the Union's rally was to publicize and garner support for its health based grievances against Goya for alleged rodent infestation and unsanitary and unsafe working conditions. ALJ Cullen also noted that on June 23, 1999, Turienzo and Martin registered complaints with the Florida Department of Agriculture, which found rodent activity.

2. Goya's witnesses

Goya Foods of Florida is a trade name or d/b/a for Goya Foods, Inc. In his underlying decision, ALJ Cullen noted that Goya is the largest wholesaler of Hispanic food products in the United Sates and operates in several States and Puerto Rico as well as in Miami, Florida. Robert Unanue has been with Goya Foods, Inc. for 34 years.[5] In August 1999, Robert Unanue replaced his cousin Mary Ann Unanue to become president of Goya Foods of Florida and he reported to his uncle, Joseph Unanue, who was then serving as president of Goya Foods, Inc. In 2004, Robert Unanue became president of Goya Foods, Inc. and his brother currently serves as executive vice president for Goya Foods, Inc.

ALJ Cullen also noted in his decision that an individual identified as Frank Unanue was the uncle of Mary Ann Unanue and was also a part owner of Goya. Both Mary Ann Unanue and the individual identified as Frank Unanue was found by the ALJ to have engaged in conduct violative of Section 8(a)(1). After Robert Unanue served as president of Goya Foods of Florida, Francisco Unanue became president of Goya Foods of Florida and remains in that position at this time. Both Francisco Unanue and Robert Unanue attended the June 2000 unfair labor practice hearing. Goya's counsel clarified at hearing that Francisco Unanue is the son of Frank Unanue; the individual who is discussed in ALJ Cullen's decision. Francisco Unanue testified that at the time that the settlement agreements were signed with the employees in 2000, he was not an employee of Goya. He testified that his cousin, Robert Unanue, brought him into the settlement discussions because he was known to the employees because of his previous employment with Goya.

[5] His testimony reflects that while he took two sabbaticals from the Company during the period of time between 1990 and 1999, he returned to the Company to assume the position of president of Goya Foods of Florida in August 1999.

F. Facts of the Case as Presented by the Parties

1. Martin's recollection of signing the settlement agreement

Jesus Martin testified that Francisco Unanue initially contacted him approximately 2 or 3 weeks before he actually signed the settlement agreement. He confirmed that both Francisco Unanue and Robert Unanue telephoned him over a 3-week period. He ultimately met with Francisco Unanue and Robert Unanue at Francisco Unanue's office to sign the agreement. Martin testified that when he spoke with Francisco Unanue, Unanue said, "I've called you because the judge declared that you workers have no right." Martin testified "in other words, that we lost the Union, that we had lost the case." Martin recalled that he questioned Unanue if it were true that the judge had said that they had lost the case. Unanue confirmed that it was true. Martin testified that after he first talked with Unanue, he did not contact the Union to verify the status of the case. He testified that he did not know who to contact in the Union. He spoke, however, with Turienzo prior to signing the settlement agreement and discussed Unanue's statement that the judge had decided against the Union and the employees had lost their case. Turienzo told Martin that if that were the case, they would have to sign Goya's agreement.

Martin also testified that he did nothing to contact the Union because he believed Francisco Unanue. Martin testified that he did not read the settlement agreement before he signed it. In fact, Francisco Unanue read the settlement agreement to him. Martin also recalled that on the day that he signed the settlement agreement, Unanue sent him to the bank and he received $25,000. Martin explained that he signed the settlement agreement because he had debts, and complications because of his diabetes and he had no money.

2. The involvement of employee Gilberto Torres

During the same 2- to 3-week period prior to his signing the settlement agreement, Martin also received two to three telephone calls from employee Gilberto Torres urging Martin to sign the settlement agreement. Martin testified that Torres told him that the Union had lost the case and that Goya was not tricking him and he should sign the settlement agreement before he lost everything. Martin testified that he believed Torres and he believed Francisco Unanue.

Torres has been employed with Goya since on or about March 1993, and on May 14, 2001, Torres was promoted to fleet maintenance supervisor. Prior to that time, he was a warehouse employee. Torres denied that he ever told Martin that the Union had lost the case or that he advised Martin to take the settlement before he lost everything. Counsel for the Acting General Counsel submitted into evidence documents showing that Torres received various loans or pay advances from Goya during the period of time from November 1999 through November 2000. Specifically, Torres received the following loans: (1) $85 on November 10, 1999; (2) $300 on December 1, 1999; (3) $700 on May 26, 2000; (4) $150 on June 1, 2000; (5) $2500 on September 6, 2000; and (6) $3000 on November 3, 2000. Torres testified that he paid back each of the loans that he received from Goya. In response to the exhibits submitted by the Acting General Counsel, Goya submitted into evidence documents covering a period of time from September 10, 1993, through February 9, 2009, reflecting 19 loans or pay advances to Torres. The amount of the loans ranged from $100 to $5000. Torres testified that he repaid all of the loans or pay advances during this period of time.

In her posthearing brief, counsel for the Acting General Counsel points out that Torres received the loan of $2500 approximately 1 month prior to Martin's signing the settlement agreement and he received the loan of $3000 only 3 days after Turienzo signed the settlement agreement. Counsel further submits that prior to the fall of 2000; Torres had never received loans as large as those given to him in September and November 2000 and that he did not receive any other loans as large as these until he became a supervisor. Furthermore, counsel for the Acting General Counsel points out that unlike all but one of the other loans to Torres, the September 6 and November 3, 2000 loans do not have any notation showing that the loans were to be deducted from his paycheck or that the loans have ever been repaid. The only other loan without this notation was a loan of $5000 given to Torres in February 2003 and after his promotion to supervisor.

3. Turienzo's recollection of signing the settlement agreement

Turienzo testified that approximately 1 to 2 days before he signed the settlement agreement, he was contacted by Francisco Unanue. Unanue told him that he wanted to have a meeting with him in his office. The record reflects that Francisco Unanue's office was located in a building other than Goya; however, in a facility affiliated with Goya. The meeting was held in Francisco Unanue's office at approximately 5:30 or 6 p.m. in the afternoon. Both Francisco Unanue and Robert Unanue were present. Turienzo testified that while Robert Unanue was present during the meeting, Francisco Unanue conducted the meeting. Turienzo recalled that Unanue told him that the Union had lost its case against Goya and that he (Turienzo) had lost all his legal resources. Unanue told him that because he had been a good employee there for 13 years, Goya would offer him a proposition. Unanue said that he did not want Turienzo's family to suffer the consequences. In describing what Francisco Unanue told him, Turienzo recalled: "They did not want my family to suffer the consequences, that I could be recompensated with a settlement of $22,000 if I signed a paper that I would never talk or anything, some kind of waiver of never talking bad about Goya, never going on television, newspapers, or any kind of press, radio."

Although Turienzo asserted to Unanue that he had made more money than that when he worked there, Unanue stated that this amount was the most that Goya could offer him. Turienzo asked if the Board knew about the agreement. Unanue told him that the Board didn't have to know about it because the Union had already lost the trial and Goya had won the trial.

Turienzo recalled that he just glanced over the settlement agreement before signing it and he was in the meeting for only about 25 minutes. Turienzo did not know who prepared the document that he signed. Additionally, he testified that he did not suggest any language contained in the private settlement agreement. He understood that in signing the agreement, he was prohibited from discussing or disclosing the terms of the

document. He denied that it was his idea to include this language. Turienzo confirmed that he is not an attorney nor has he ever studied law. He has never drafted a legal document and does not write in English. Before leaving the meeting, he received a check for the $22,000. Turienzo testified that at the time of the meeting, he was unaware of the amount of backpay that the Board was seeking for him. He also testified that he did not read the section of the settlement agreement that precluded his engaging in any union activity related to Goya and its employees.

4. The testimony of Robert and Francisco Unanue

Robert Unanue testified that during the summer of 2000, he received a telephone call from Turienzo. He asserted that he had never met Turienzo. He testified that Turienzo told him that he would like to get together with Unanue to work things out and he wanted to come to see him. Robert Turienzo testified that he later met with Turienzo in his office. Unanue testified that Turienzo had a "couple of offers" to Goya. Unanue asserts that Turienzo offered to stop disparaging the Company and he wanted a confidential agreement. Unanue recalled that he told Turienzo when they met that he could not return to work for Goya. Unanue testified that Turienzo was "okay" with that and confirmed that he would get the other parties together for a meeting. Unanue testified that there was no discussion about any specific monetary amount to be paid to Turienzo.

Robert Unanue testified that he later attended a meeting with Turienzo, Martin, Galvez, and Bravo. Robert Unanue explained that because the employees "didn't want to create a ruckus," the meeting had been held in Francisco Unanue's office and not at the Goya facility. Robert Unanue recalled that during this meeting, there were discussions about the employees' disparaging the Company, confidentiality, and backpay. There was also discussion concerning the fact that there would be no reinstatement for Turienzo, Martin, and Galvez.[6]

Francisco Unanue testified that he attended a meeting in July or August 2000 with Turienzo, Martin, and Humberto Galvez. Initially, he could not recall whether Bravo or Robert Unanue was present. He recalled that the meeting lasted for approximate 30 to 45 minutes and he identified Turienzo as the person "carrying" the conversation. He described the meeting as a conversation to "see if something could be worked out" and he explained that it was just a "concept" of the employees with their proposal to stop bad-mouthing the Company if Goya gave them money. He described the proposed arrangement as akin to an amicable divorce. Unanue also asserted that the subject of the employees ceasing to bad-mouth the Company was initiated by Turienzo and not Goya. Unanue also testified that it was Turienzo who wanted the confidentiality clause included in the agreement. Unanue asserted that while the employees offered to cease bad-mouthing the Company in exchange for money, no monetary amount was discussed. Unanue acknowledged, however, that it was important to Goya that the employees stop bad-mouthing the Company. Francisco Unanue testified that Goya responded to the offer by saying that they would think about it and get back with the employees. Francisco Unanue testified that Goya may have presented documents to the employees during this first meeting; however, he could not recall whether Goya had any documents at that time. He recalled that no agreement was reached with the employees during the first meeting. Francisco Unanue also testified that the employees had not wanted the other employees in the warehouse to know that they were meeting with Francisco and Robert Unanue.

Francisco Unanue testified that he had a second meeting with Turienzo, Martin, and perhaps Bravo at his office. He recalled that Robert Unanue was out of town and did not attend the meeting. He could not recall how the second meeting came about. He opined that either Goya called the employees or the employees called and initiated the meeting. He testified that by this second meeting, there was a document that covered the topics discussed during the first meeting. Francisco Unanue asserted that he gave the document to the employees and told them to take it home with them and to read it and consult with whomever they wished and when they were "ready" to call Goya. Francisco Unanue could not recall whether any specific monetary amounts were discussed during this meeting.

Robert Unanue testified that during this period of time, he spoke with Martin a couple of times by telephone. Francisco Unanue recalled that following his second meeting with employees, he met again with Martin and Turienzo and an agreement was reached with Martin. He recalled that during the meeting, Turienzo told Martin that he thought that it was a good deal. At a later time, Francisco Unanue and Robert Unanue met with Turienzo in which an agreement was reached with Turienzo.

Francisco Unanue denied that he told the employees during any of the meetings that the Union had lost the case before the judge and he denied that he referenced the judge during the meetings. Robert Unanue also denied that he ever heard Francisco Unanue make any statements during the meetings about the ALJ decision or the unfair labor practice trial. Francisco Unanue also testified that he never made any attempt to interpret or explain the settlement documents to the employees during any of his meetings with the employees. He asserted, however, that the employees understood that if they accepted the deal, they could not ever return to work for the Company. Robert Unanue testified that Francisco Unanue and he asked the employees if they understood the documents and had time to review the documents. He recalls that the employees responded, "Yes."

Robert Unanue asserted that Goya did not disclose the contents or the existence of the private settlement agreements to either the Charging Party Union or to the Board because of the wishes of Turienzo. Unanue contends that Turienzo told him that he wanted their discussions to remain confidential because he did not want outside pressure from the Union or anyone else. Unanue also testified that while the private settlement agreements were prepared by Goya's representatives, many of the terms were proposed by Turienzo and the discriminatees.

5. Turienzo's rebuttal testimony

On rebuttal, Turienzo testified that he did not approach Goya

[6] Although Bravo had not lost his job with Goya, there was discussion about his receiving some money and then leaving the Company.

after the unfair labor practice hearing to try to settle the case. He testified that Francisco Unanue telephoned him to initiate the settlement discussions. Turienzo denied that he offered to either Robert Unanue or Francisco Unanue to stop bad-mouthing the Company in exchange for a settlement. Turienzo also denied that he ever told Francisco Unanue or Robert Unanue that he wanted to keep the settlement agreements confidential. He also denied that he ever spoke for any of the other employees during the settlement discussions. Turienzo testified he only had one telephone conversation with Francisco Unanue and no telephone conversations with Robert Unanue. He confirmed that he attended only one meeting with Francisco and Robert Unanue. He denied that he attended any meetings with Goya and the other employees.

II. CONCLUSIONS

Goya asserts that the Board should give effect to the settlement agreements between Goya and Turienzo and Martin whereas the Acting General Counsel maintains that the settlement agreements should be rejected. Both Goya and the Acting General Counsel cite the Board's decision in *Independent Stave Co*., 287 NLRB 740 (1987), in support of their positions. In this landmark decision dealing with private settlements, the Board not only reiterated its guiding principles in analyzing settlements, but it also set out various factors that may be used in the analysis of private settlements. Referencing its prior decisions in *Combustion Engineering*, 272 NLRB 215 (1984); *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979); and *Texaco, Inc.,* 273 NLRB 1335, 1336–1337 (1985), the Board acknowledged its longstanding policy of encouraging the peaceful, nonlitigious resolution of disputes and its policy of encouraging parties to resolve disputes without resort to the Board's processes. The Board went on to point out, however, that notwithstanding this strong commitment to settlements, it is not required to give effect to all settlements reached by the parties to a dispute whether the settlement is reached with or without the General Counsel's approval. *Independent Stave,* above at 741. The Board explained that its power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private "rights." Additionally, the Board made it clear that the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. Ibid.

The Board acknowledged that it would be impossible to anticipate each and every factor which would have relevance to a review of non-Board settlements and thus did not find it necessary to provide an exhaustive list of all the factors that may be relevant in individual cases. In the alternative, the Board explained that it would examine all the surrounding circumstances. Such analysis would include, but not be limited to (1) whether the charging party or parties, the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. *Independent Stave*, above at 743.

Goya asserts that all of the *Independent Stave* factors weigh heavily in favor of giving effect to the settlements. The Acting General Counsel, however, contends that all of the factors favor the rejection of the private settlement agreements executed by discriminatees Martin and Turienzo.

A. Analysis of the Independent Stave Factors

1. Whether the parties agree to be bound and the position of the Acting General Counsel

On September 25, 2006, Goya filed a motion for reconsideration and motion to reopen the hearing with the Board. In its motion, Goya identified a number of changes in Goya's management personnel, operations, and employee earnings that occurred after the close of the 2000 hearing. In describing the changed circumstances and in asserting that the Board's ordered remedy was no longer appropriate, Goya also asserted that three[7] of the four individuals that the Board had ordered Goya to pay backpay and to offer reinstatement had signed waivers and accepted payment to release their claims to reinstatement and backpay. Counsel for the Acting General Counsel asserts that Goya had not raised the existence of the settlement agreements until it referenced the settlement agreements in this 2006 motion to the Board. In an order dated December 15, 2006, the Board denied Goya's motion.[8]

Goya asserts that the first factor of the *Independent Stave* analysis is met because the parties agreed to be bound. There is no dispute, however, that the General Counsel and the Charging Party Union were not parties to the settlement. Additionally, Goya acknowledges that there was no attempt to notify the Union or the General Counsel of the settlement agreements. Goya contends that it agreed to be bound and that it lived up to its part of the agreements. Goya also maintains that both Turienzo and Martin agreed to be bound when they signed the agreements. Although Goya admits that both the Union and the Acting General Counsel oppose giving effect to the settlements, Goya treats this opposition as less significant than the intention of Goya and Martin and Turienzo to be bound, I find this argument without merit.

The Board has long held that the opposition of the General Counsel and the charging party is a significant factor to be considered in determining whether a non-Board settlement is to be accepted. *Copper State Rubber*, 301 NLRB 138 (1991); *TNS,*

[7] Although not specifically included in the compliance specification and notice of hearing, Reinaldo Bravo also signed a private settlement agreement with Goya on September 26, 2000. In receipt for $37,000, he agreed to resign from Goya. The agreement also contained a confidentiality provision similar to those agreements signed by Turienzo and Martin and the agreement prohibited his engaging in any union activity relating to Goya and its employees.

[8] In its Order, the Board noted its agreement with the General Counsel that the matter of the private settlements and the discriminatees' waiver of reinstatement and payment of backpay should properly be raised and litigated in the compliance stage of the proceeding.

Inc., 288 NLRB 20, 22 (1988). Certainly, there are circumstances in which the Board has accepted settlement agreements over the opposition of the General Counsel or the charging party. In fact, in *Independent Stave Co.,* 287 NLRB 740, 743–744 (1987), the Board accepted settlement agreements entered into by the respondent and the alleged discriminatees over the General Counsel's opposition. The facts, however, were markedly different than those found in the case in issue. The union not only found the proposed settlements to be "fair," but also encouraged the approval and effectuation of the settlement agreements. Additionally, the settlement agreements in *Independent Stave* were reached only 10 days after the issuance of the complaint. The Board noted that inasmuch as the settlement agreements provided for immediate employment, retroactive seniority, and a reasonable payment of backpay, and in light, of there being no evidence of fraud, coercion, or duress the Board accepted the settlement agreements over the opposition of the General Counsel.

Goya cites the Board's decision in *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 615 (2007), as a case in which the Board approved a settlement agreement over the opposition of the General Counsel and the union. As Goya points out, the Board noted that the alleged discriminatees voluntarily agreed to be bound. In that case, however, the parties also stipulated that the alleged discriminatees were aware of the content, advised of the meaning, and knew that they were waiving and releasing claims against the respondent. Furthermore, at the time that the agreements were signed, no charges had been filed and the prospect of litigation was not obvious. Furthermore, the record did not reflect that all of the alleged discriminatees had engaged in protected activity or that the respondent was aware of it. Many of the 27 alleged discriminatees who were presented at the hearing were not openly supportive of the position of the General Counsel or the union. More importantly, however, there was no evidence that the agreements were fraudulent or that the alleged discriminatees signed the agreements under duress or threat of coercion. Above at 615–616. Thus, the facts of *BP Amoco Chemical-Chocolate Bayou* are markedly distinguishable from those in the instant case.

Unlike the circumstances in *Independent Stave* or *BP Amoco Chemical-Chocolate Bayou*, these settlement agreements were signed approximately 6 months after the complaint issued and approximately 4 months after the unfair labor practice hearing. Additionally, the opposition of the Acting General Counsel and the Union is even more significant because of the content of the agreements and the evidence of fraud and misrepresentation. Thus, the first factor in the *Independent Stave* analysis would not support the Board's acceptance of the private settlement agreements.

2. Whether the settlements are reasonable

The second factor in the *Independent Stave* analysis looks to whether the settlement is reasonable given the nature of the violations alleged, the stage of the litigation, and the risks inherent in the litigation. Goya submits that the settlement agreements were entered into at a time when it had not been established that Goya had violated the Act. Goya is correct that the settlement agreements were entered into 4 months prior to the ALJ's decision, 6 years before the Board's decision and 8 years before the court's decision. Goya argues that the matter cannot be judged in hindsight and must be viewed from the perspective of the litigants at the time of the settlement. The Acting General Counsel asserts that although Goya had not been found to have committed unfair labor practices prior to the execution of the private settlement agreements, Goya was later found by the Board to have committed extensive and serious violations of Section 8(a)(1), (3), and (5) of the Act. The Acting General Counsel further argues that since the execution of the settlement agreements and the Board's decision in the instant case, the Board has issued three additional decisions, finding that Goya violated the Act. Interestingly, in a 2007 decision, the Board specifically found that Goya violated Section 8(a)(5) and (1) of the Act by making unilateral changes in the terms and conditions of employment of drivers, warehouse employees, and sales employees at its Miami facility on various dates, including the precise period of time in which Turienzo and Martin signed the settlement agreements. Despite the fact that the Board has found that Goya has continued to violate the Act after the execution of private settlements with Martin and Turienzo in October 2000, I agree with Goya that the validity of the settlement agreements must be determined by the circumstances occurring at the time of the execution and not based on Goya's subsequent actions.

Overall, however, the components of the second *Independent Stave* factor do not support the acceptance of the settlement agreements. As discussed briefly above, the settlement agreements were executed approximately 4 months after the parties engaged in a 13-day trial. As pointed out by the Acting General Counsel, the settlement agreements were not executed until the General Counsel had spent significant time and resources litigating the case before the ALJ. The strength of the General Counsel's case had already been disclosed and the risks of litigation were much lower than in cases where the settlement was reached prior to litigation or in the very early stages of litigation.

More important than the issue of the risk of litigation or the stage of the litigation is the analysis of whether the settlement is reasonable given the nature of the alleged violations. Relying upon *Independent Stave Co*., Goya asserts that a settlement agreement is not required to "fully remedy" all charged violations. Goya submits that the Board approved a settlement in *American Pacific Pipe Co*., 290 NLRB 623, 624 (1988), in which the discriminatee was paid 50 percent of the amount calculated by the General Counsel. Considering all the circumstances of the case, the Board determined that honoring the parties' agreement advanced the purposes of the Act and no public policy would be served by addressing the backpay issue's merits. Unlike the instant case, the settlement in *American Pacific Pipe* was executed by not only the discriminate and the respondent, but also the charging party union. Additionally, the Board noted that while the record did not disclose precisely why the discriminatee agreed to accept only 50 percent of calculated backpay, the record reflected that there were discussions concerning the diligence of the discriminatee's search for interim employment and discrepancies between the interim

employment list submitted to the unemployment office and to the General Counsel. Thus, it would appear that the overall circumstances considered by the Board in *American Pacific Pipe* were quite different than the circumstances of the instant case.

Goya asserts that the amounts paid to Turienzo and Martin were 100 percent of the backpay putatively owed them at the time of the settlement. Goya opines that the payments of $22,000 and $25,000 "made in 2000 dollars," judged against future value and the uncertainty of ever getting any money was not only reasonable but "generous." Despite whether the specific amounts to Turienzo and Martin were in fact sufficient, this argument totally ignores the fact that Goya's proposed remedy involved only these monetary payments. As counsel for the Acting General Counsel points out, the only employee interest addressed in the settlement agreements was the monetary remedy offered to Turienzo and Martin. Counsel for the Acting General Counsel further submits that the settlement agreements provided for none of the other remedies ordered by the Board including the "cessation of the unfair labor practices; the reinstatement of Martin, Turienzo, and Galvez; the making whole of Galvez; the making whole of Respondent's employees in both bargaining units for any losses of wages or other benefits they may have suffered as a result of Respondent's unilateral actions in assigning routes to drivers and stores to salesmen since dates in 1998, and as a result of the disproportionate increase in the number of temporary employees regularly employed as drivers; the making whole of Respondent's employees in the warehouse and driver units for any losses occasioned by the unilateral cessation of the policy allowing employees to take company-provided radio phones home with them; recognition of and bargaining with the Union; the rescission of unilateral changes upon the Union's request; and posting of a notice to employees assuring them that they have a right to engage in Section 7 activities and that Respondent cannot violate the Act with impunity."

One of the most significant aspects of the Board's ordered remedy is the posting of a notice to employees that addresses each aspect of Goya's unlawful conduct. In addition to finding that the Respondent violated Section 8(a)(3) and (5) of the Act as described above, the Board also found that Goya's supervisors and agents violated Section 8(a)(1) of the Act by engaging in 12 separate types of conduct that violated employees' Section 7 rights and included various unlawful statements, promises, and threats to employees. The Board-ordered notice gives assurances to employees that Goya will no longer engage in such conduct. As the Board has long recognized, the requirement that respondents post a notice "informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations has been an essential element of the Board's remedies for unfair labor practices since the earlier cases under the Act." *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 2 (2010). The Board further noted that remedial notices serve a number of important functions in advancing the Board's mission of enforcing employee rights and preventing unfair labor practices. Remedial notices help to counteract the effect of the unfair labor practices by informing employees of their rights under the Act as well as informing employees of the Board's role in protecting their free exercise of those rights. Ibid. Thus, the notice to employees not only lets the employees know what a respondent is doing to correct and remedy the current violations, but also gives employees assurances that future violations will not occur.

Thus, the executed settlement agreements were totally unreasonable given the nature of the alleged violations, the stage of the litigation, and the risks inherent in litigation.

3. Whether there was fraud, coercion, or duress by any of the parties

Goya asserts that there is no possibility of coercion or duress in this case inasmuch as Martin and Turienzo had been separated from their employment with Goya for more than a year at the time they signed the settlement agreements. Goya argues that since these individuals were not employed with Goya, Respondent could not threaten their jobs. Additionally, there is no evidence of any physical or economic threat to either of these individuals. Goya asserts that because it was simply not possible for Goya to adversely affect them, counsel for the Acting General Counsel must prove fraud to support this *Independent Stave* factor.

While there does not appear to be evidence of coercion or duress, there is credible evidence of Goya's deception and intentional misrepresentation to Martin and Turienzo. Both Martin and Turienzo credibly testified that at the time the agreements were presented to them, Francisco Unanue told them that the Union had lost their cases before the ALJ. Francisco Unanue and Robert Unanue vigorously denied that any such statement was made to either Martin or Turienzo. There were only four witnesses who testified about the conversations that preceded the signing of the settlement agreements. These witnesses were Martin, Turienzo, Francisco Unanue, and Robert Unanue. On the basis of the total record evidence, I found the testimony of Martin and Turienzo to be the most credible.

The testimony of Francisco Unanue and Robert Unanue was very precise and consistent. Each one's testimony closely mirrored the testimony of the other. In contrast, the testimony of Martin and Turienzo was not polished and was much less specific. Because they testified through an interpreter, there was not an even flow in the testimony. Frequently, their testimony was interrupted by counsels' objections to the interpreter's translation and questions had to be clarified or restated. Despite these interruptions and the awkwardness of the question and answer process, Martin and Turienzo nevertheless presented a credible description of the circumstances surrounding the signing of the settlement agreements.

Both Martin and Turienzo testified that prior to their signing the settlement agreements; they were initially contacted by Francisco Unanue. Martin recalled that both Robert Unanue and Francisco Unanue telephoned him over a 3-week period prior to his meeting with Francisco Unanue and Robert Unanue and his signing the agreement. Turienzo also recalled that while he had spoken with Robert Unanue before his meeting with Francisco and Robert Unanue, there was no prior meeting with Robert Unanue. Both Martin and Turienzo recalled that

Francisco Unanue did most of the talking concerning the settlement agreements. Both Turienzo and Martin recalled that it was Francisco Unanue who told them that the Union had lost the case. Martin recalled that after initially hearing this from Francisco Unanue, he contacted Turienzo and they discussed their options. Turienzo told him that if the Union had lost the case, they would have to sign Goya's proposed settlement agreements.

During the 2- to 3-week period prior to signing the agreement, Martin also received two to three telephone calls from employee Gilberto Torres telling him that the Union had lost the case. Torres told him that Goya was not trying to trick him and that he should sign the settlement agreement before he lost everything. The record reflects that at the time that Torres spoke with Martin and urged him to accept Goya's settlement, Torres was not a supervisor or manager. He was not promoted to a supervisory position until approximately 6 months later. The record reflects that over a period of time from 1993 through February 2009, Torres received loans and pay advances from Goya in various amounts. Torres testified that all loans and pay advances were repaid. Counsel for the Acting General Counsel submits, however, that Torres received a loan of $2500 approximately 1 month prior to Martin's signing the settlement agreement and an additional loan of $3000 only 3 days after Turienzo signed the settlement agreement. Counsel asserts that prior to the fall of 2000, Torres had never received loans as large as those given to him in September and November 2000 and that he did not receive any other loans as large as these until he became a supervisor. Counsel also asserts that contrary to other[9] loans that were periodically made to Torres, the loan documentation for these two loans does not reflect any notation showing that the repayment of the loans would be deducted from his paycheck or have ever been repaid.

Martin testified that he believed Torres just as he believed Francisco Unanue. Martin explained that he had considered Torres to be a friend and he had financially helped Torres when they had worked together. Torres denied that he ever made the telephone calls to Martin, urging him to sign the settlement agreement or telling him that the Union had lost the case. Clearly, there is no corroborating evidence to show that Torres made the telephone calls to Martin or that he participated in a campaign to induce Martin to sign the settlement. The record evidence, however, strongly suggests that Torres was a friend to Martin and a likely person to reinforce to Martin that the Union had lost the case and that Martin should sign the settlement agreement. While there is no proof that Torres received favors from Goya for his persuasive telephone calls to Martin, the timing of the significant loans and his promotion is certainly suspect. Crediting Martin's testimony, I find that Torres made the calls to Martin. There is, however, no direct evidence that he was acting as an agent of Goya or at the direction of Goya. Accordingly, while it is certainly most likely that Torres acted at the direction of Goya in contacting Martin and affirming Francisco Unanue's statements to Martin; there is not a sufficient basis to find Torres as an agent in misrepresenting the status of the unfair labor practice proceeding to Martin.

Even without a finding that Torres acted as an agent of Goya, the overall record reflects that Goya intentionally misrepresented the status of the unfair labor practice proceeding during the execution of the private settlement agreements. I base this finding upon a number of reasons as discussed below.

Francisco Unanue and Robert Unanue assert that the settlement agreements were ultimately perfected after a number of meetings and telephone conversations with Martin and Turienzo. Their testimony conveys a give-and-take interaction in which all parties participated and negotiated the terms of the settlement. They further assert that these discussions came about because Turienzo unexpectedly contacted Robert Unanue with an unsolicited proposal to stop disparaging the Company. According to Goya, Turienzo and Martin were not seeking reinstatement, and yet they desired strict confidentiality. It is incredibly providential that the employees came forward proposing terms and conditions so aligned with Goya's interest? Goya would assert that this alleged initiative was taken by warehouse employees who do not speak, read, or write English and who had no apparent background in business, employment relations, or law. Goya's explanation suggests that despite the apparent disparity in language skills, background, and employment experience, the discriminatees participated in negotiating a settlement on equal terms with two accomplished businessmen who must have appeared quite formidable to these former employees. Such a scenario is simply not realistic. There is no dispute that there were settlement negotiations between, Goya, the Union, the Board's Regional Office, and the four discriminatees during the unfair labor practice hearing in the Miami office of the Board. In its posthearing brief, Goya describes the negotiations as continuing for hours with the Board's attorney translating to and from English and Spanish. Even with the assistance of the Board's attorney as well as the Union's attorney and others, no settlement was reached. Thus, it is incredible that these two discriminatees negotiated a settlement on their own with Goya and independently proposed such settlement terms as confidentiality and the cessation of union activity or disparagement of the Company as Goya suggests.

Robert Unanue assumed the Florida operation in August 1999. He began working for the family business in 1977 and has served in various roles with Goya since that time. As president of Goya Foods of Florida, Robert Unanue was responsible for running the facility. He testified that one of his responsibilities during the period of time between June and October 2000 was "saving the facility from the onslaught of a very public smear campaign." Counsel for the Acting General Counsel asserts that it would have been rather fortuitous for Robert Unanue if Turienzo had called him and offered to end the "smear campaign" in exchange for a settlement. Although Turienzo acknowledges that he had publicly accused Goya of having rats in its warehouse, the impetus was on Robert Unanue to find a way to stop what he believed to be a smear campaign against the Company. It is simply inconceivable that Turienzo just happened to devise a plan for settlement by which the bad publicity could be stopped.

Goya argues that a finder of fact may consider a witness' in-

[9] The only other documented loan that did not include a notation on repayment was a loan of $5000 given to Torres in February 2003 and after his promotion to supervisor.

terest in the outcome of a proceeding in assessing the witness' credibility. Goya further asserts that I must consider that Turienzo and Martin stand to gain considerably if the settlements are not given effect by the Board as each would receive additional backpay and each would have to be offered reinstatement. While that is certainly true, the same can be said for Francisco and Robert Unanue. If the settlement agreement is not given effect by the Board, Goya will have to pay the remaining net backpay that has accrued since 2000 and Goya will have to offer these discriminatees reinstatement. Thus, the credibility of Francisco and Robert Unanue is equally subject to scrutiny because of their interest in the outcome of this proceeding. In posthearing brief, counsel for Goya argues that Francisco and Robert Unanue's testimony should be credited; describing it as consistent, calm, deliberate, and unshakeable. As I have indicated above, their testimony was consistent and smoothly presented in contrast to the testimony of Martin and Turienzo. Nevertheless, I found Turienzo and Martin's testimony to be more credible.

Perhaps because Martin and Turienzo testified through an interpreter, there were some instances in their testimony where there was not extensive explanation and the testimony was abbreviated or condensed. Having heard their testimony in its entirety, it is apparent that some inconsistencies or contradictions may have arisen because Turienzo and Martin may have been initially confused by the questions or uncomfortable with the hearing process. While the record is somewhat unclear as to the precise time in which Turienzo first learned of the proposed settlement agreement and Goya's assertion that the Union lost the case, such ambiguity does not diminish Turienzo's testimony in pertinent part. In light of all of the record testimony, any minor inconsistencies in the testimony of Turienzo and Martin are not fatal to the total credibility analysis.

Prior to the testimony of Jesus Martin, counsel for the Acting General Counsel disclosed that Martin had been evaluated by his primary care physician on December 17, 2010. His physician diagnosed Martin as having a "mild impairment which precludes [him] from being able to understand new material easily." In response, Goya asserted that Martin's testimony must be precluded, or in the alternative, that Goya be allowed to conduct an independent medical examination of the witness to determine the degree of mental impairment of the witness.

Fed.R.Evid. 601 provides that every person is competent to be a witness except as otherwise provided in the Federal Rules of Evidence. Those additional qualifications limit the witness to matters to which he or she has personal knowledge (Fed.R.Evid 602) and requires that the witness take an oath (Fed.R.Evid. 603). At modern common law, there is no rule automatically excluding a person with diminished mental capacity. The test is whether the witness has enough intelligence to make it worthwhile to hear him at all and whether he recognizes a duty to tell the truth. McCormick*, Evidence* Section 62 (6th ed. 2006). A witness's competency at most requires only a minimal ability to observe, recollect, and recount as well as an understanding of the duty to tell the truth. Ibid. Furthermore, when a mature person of normal appearance and demeanor is offered as a witness, he is presumed to be a competent witness and incompetency must be shown by the party objecting to him. *Henderson v. U.S.*, 218 F.2d 14, 18 (6th Cir. 1955), cert. denied 349 U.S. 920 (1955). Thus, it is a well-established principle, as based upon Fed.R.Evid. 601 that witnesses are presumed competent to testify. *U.S. v. Devin*, 918 F.2d 280, 291–292 (1st Cir. 1990).

The courts have long recognized that the competency of a witness to testify is a determination for the trial judge. *U.S. v. Hyson*, 721 F.2d 856, 864 (1st. Cir. 1983); *U.S. v. Martino*, 648 F.2d 367, 389 (5th Cir. 1981), cert. denied 456 U.S. 943, 949 (1982). When the competency of a witness is challenged before testifying, it is the duty of the court to make such examination as will satisfy it of the competency or incompetency of the witness. The form of the examination rests in the discretion of the court. *Henderson v. U.S.,* above at 17. In the instant case, I allowed counsel for the Acting General Counsel to begin her examination of Martin with a series of background and foundational questions to demonstrate his ability to observe, recollect, and recount events, as well as his understanding of his sworn duty to tell the truth. Counsel for Goya was given a similar opportunity to question Martin with respect to related aspects of competency. At the exhaustion of the examination by both the Acting General Counsel and Goya, I found that Martin was fully competent to testify concerning substantive matters.

Martin's testimony reflected no apparent memory deficit concerning the events occurring in 2000. His testimony demonstrated that he had the capacity to recall the events of 2000 and he appeared to fully understand his duty to testify truthfully under oath. Based upon the initial questioning by the counsel for the Acting General Counsel and counsel for Goya, I found no basis to preclude his testimony or to require an independent medical examination. *U.S. v. Lightly,* 677 F.2d 1027, 1028 (4th Cir. 1982).

Accordingly, based upon the credible testimony of both Turienzo and Martin, I find Goya intentionally misrepresented the status of the outstanding unfair labor practice case as it induced Turienzo and Martin to sign the private settlement agreements.

4. Whether the settlement agreements were contrary to the policies and purposes of the Act

There is no dispute that each of the settlement agreements signed by Turienzo and Martin contained a provision requiring that the discriminatee "agrees that he will not engage in any union activity relating to GOYA and/or its employees." In signing the settlement agreements, Martin and Turienzo also agreed that they would not disclose or discuss the terms of the agreement or the circumstances related thereto with any other person other than their attorney, accountant, or tax advisor. The Acting General Counsel submits that these terms are repugnant to the purposes and policy of the Act.

Goya takes the position that the Acting General Counsel's concerns are misplaced, contending that the wording "union activity" meant something entirely different to the parties. Goya asserts that the sole direct evidence in the record of the meaning of the phrase "union activities" as it is used in the settlements is the testimony of Robert and Francisco Unanue. Francisco Unanue testified that the intent of this phrase was to prohibit Turienzo and Martin from "disparaging the company." He went on to explain that he believed that the phrase relating

to union activity was meant to prohibit the individuals disparaging Goya. Robert Unanue testified that the wording dealing with union activity represented the "spirit" of Goya's agreement with Turienzo and Martin and he contended that the intent of the language was to prohibit disparaging Goya. Both Francisco and Robert Unanue contended that the language was included in the agreements because it was first brought up by Turienzo.

Relying upon the testimony of Francisco and Robert Unanue, counsel for Respondent argues that it is fundamental law that the meaning of a contract, including contracts settling unfair labor practice charges, is the intent of the contracting parties. In support of this argument Respondent cites cases in which the Board or a court dealt in part with the intent of contracting parties in order to determine the meaning of contract language. These cases, however, dealt with agreements between unions and employers[10] and one case even dealt with language that had been included in an informal Board settlement executed by the respondent employer, the union, and a Regional Director for the Board.[11] Clearly, all of the cases cited by Goya dealt with contracting parties who fully participated in the negotiation of the terms of their agreements. There is no credible evidence that such a similar negotiation occurred in the execution of these agreements. Francisco and Robert Unanue assert that there were a number of meetings that occurred in which Turienzo, Martin, and Bravo met and discussed the terms of the agreements. When asserting that union activity meant disparaging Goya, Robert Unanue testified:

> And that's the intent, that's the spirit of this agreement. And it was discussed at meetings. So what the document represents is the summation of the spirit and the discussions of the parties, including Goya Foods, including the four parties.

In contrast, Turienzo credibly testified that he did not prepare the settlement agreement that he signed and he did not suggest the language that was included in the document. Turienzo explained that he was not an attorney, had never attended law school, or drafted a legal document. He testified that he does not write in English and would not know how to draft a legal document. He recalled that he attended only one meeting with Francisco and Robert Unanue and he denied attending any meetings with any other employees concerning the settlement agreements. Martin testified that he signed the settlement agreement given to him by Francisco Unanue without reading the document. He testified that Francisco Unanue actually read the document to him.

In describing their meetings with Martin and Turienzo, Robert and Francisco Unanue depict a negotiation in which all "parties" exchange information and positions and ultimately come to a mutual agreement. Based upon the overall testimony, such a scenario is simply not credible. As discussed more fully above, the overall evidence reflects that Turienzo and Martin met with Goya at Goya's direction. Martin and Turienzo were presented with a prepared settlement agreement with terms and conditions drafted by, and for the benefit of Goya. Turienzo testified that he understood that in receiving the $22,000, Goya did not want him "talking bad about Goya." There is no doubt that Francisco and Robert Unanue made it very clear to Martin and Turienzo that they could not disparage the Company and receive the money paid to them. There is, however, no credible evidence that the meaning of the term "union activity" was discussed by the four individuals or that there was an agreement by the "four parties" that union activity would be used in the document to mean disparagement of the company as Robert Unanue suggests.

Goya argues that Martin and Turienzo voluntarily and knowingly signed the agreement containing the "union activities" clause and, thus, the Board should defer to the free choices made by these men. Although these men may have signed the agreements voluntarily, the record evidence does not indicate that they did so with full knowledge or understanding of the terms. Even if they had understood and agreed to the prohibition against their participating in union activity, such agreement could not serve as a waiver of these statutory rights. Goya submits that the Board has noted that unions may waive statutory rights of employees and that such waivers will be given effect. In support of that argument, Goya cites the Board's decision in *Postal Service*, 300 NLRB 196, 197 (1990), in which a union accepted a settlement in a grievance proceeding over the objection of an employee. The Board opined that the employee had authorized the union to settle the dispute when he invoked the contractual grievance procedure. Goya also cites the Board's decision in *Springfield Terrace LTD*., 355 NLRB 951 (2010), in which the Board denied an employer's request for review of a regional director' decision and direction of election and the regional director's order denying a motion to reopen the record for hearing. In doing so, the Board noted that the evidence failed to establish that the union waived its right to represent a specific group of employees based on its current collective-bargaining agreement with the employer covering a different group of employees. In citing these two cases involving a union's waiver of rights, Goya asserts that "a waiver of statutorily protected rights by an individual can be given no less dignity." I find Goya's argument to be without merit.

Regardless of whether Martin and Turienzo knew and understood the terms of the settlement agreements, the undisputed language of the agreement precludes employees from engaging in activities protected by Section 7 of the Act. Each of the agreements contains a provision that states that the discriminatees agree that they will not engage in any union activity relating to Goya and/or its employees. Goya asserts that the clause is valid because its intent was to address conduct that disparages Goya. The plain language of the agreements, however, specifically prohibit all union activity and makes no reference to disparaging or "bad mouthing" the Company. The agreements waive not only the future Section 7 rights of Martin and Turienzo, but also waive a public right that is central to the core

[10] *Flint Glass Workers v. Beaumont Glass Co*., 62 F.3d 574, 78 (3d Cir. 1995), in which the court denied summary judgment and dealt with the interpretation of a settlement agreement between the union and the employer; *Allied Mechanical Services,* 352 NLRB 662, 663–664 (2008), wherein the Board looked to the language of a settlement agreement between the employer and the union to determine the nature of the parties' bargaining relationship.

[11] *Park-Ohio Industries*, 283 NLRB 571, 572 (1987).

of the protection of the Act. As such, these overly broad terms are clearly repugnant to the purposes and policies of the Act. *Ishikawa Gasket American, Inc*., 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

5. Whether Goya has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practices

At the time that these settlement agreements were executed in 2000, Goya did not have a history of violating the Act and there was no evidence that Goya had breached any previous settlement agreements. Thus, this *Independent Stave* factor is not an issue with respect to the analysis. While this factor in the analysis may not support the rejection of these settlement agreements, the remaining factors as discussed above weigh heavily toward the rejection of these private settlement agreements.

B. Summary of Conclusions

On the basis of the entire record and as described above in the analysis of the *Independent Stave* factors, I find the private settlement agreements are insufficient to waive reinstatement or to toll backpay for Martin and Turienzo. Finding the private settlement agreements to be repugnant to the policies and purposes of the Act, I have determined that these agreements must be rejected in their entirety.

C. Goya's Subpoena to Former Board Agent Arturo Ross

1. Background

Arturo Ross (Ross) was employed as an attorney with the Board's Region 12 office from July 24, 1994, to June 30, 2001.[12] During his tenure with the Board, he represented the Board in the Board's litigation proceedings against Goya from 1998 to 2001. On December 17, 2011, counsel for Goya served a subpoena ad testificandum on Ross, compelling his testimony at the hearing in this matter scheduled for January 11, 2011. Pursuant to 29 C.F.R. Section 102.66(c) of the Board's Rules and Regulations, Series 8, as amended, Ross filed a petition to revoke Goya's subpoena. On December 21, 2010, counsel for the Acting General Counsel filed a petition to revoke Ross' subpoena pursuant to Section 102.118(a)(1) of the Board's Rules and Regulations.

In his petition to revoke Goya's subpoena, Ross asserts that his testimony is precluded by Rule 102.118 of the Board's Rules and Regulations which prohibits current and former Board employees from testifying pursuant to a subpoena. In relevant part, Rule 102.118(a)(1) provides:

> no present or former Regional Director, field examiner, administrative law judge, attorney, specially designated agent, General Counsel, Member of the Board or other officer or employee of the Agency shall produce or present any files, documents reports, memoranda, or records of the Board or of the General Counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the Chairman of the Board if the document is in Washington, D.C., and in the control of the Board; or of the General Counsel if the document is in a Regional Office of the Agency or is in Washington, D.C, and in the control of the General Counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to that person's knowledge in his or her official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board if the person is in Washington, D.C., and subject to the supervision or control of the Board or was subject to the supervision or control when formerly employed at the Agency; or of the General Counsel if the person is in a Regional Office of the Agency or is in Washington, D.C., and subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the Agency. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, that person will, unless otherwise expressly directed by the Board or the Chairman of the Board, or the General Counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

On December 28, 2010, Goya submitted a written request to the Acting General Counsel, requesting consent for Ross' testimony. In its request, Goya asserts that it expects that Ross will testify that he spoke with "the leader of the discriminatees" subsequent to the close of the hearing before the judge in the above-referenced cases. Goya further asserts that Ross will testify that such person told him that the disciminatees had been offered private settlement agreements and that this individual asked Ross whether he thought that the Union and the General Counsel would win the case. Goya also asserts in its written request that Ross would testify that he told this individual that it could be a long time before the cases were resolved. Goya further asserts that Ross would testify that the "leader of the discriminatees" did not ask whether the judge had reached a decision, or whether the judge had decided against the discriminatees. Additionally, Goya asserts that Ross could discuss the details of settlement discussions that occurred during the course of the unfair labor practice hearing and his testimony would establish Board knowledge of the settlement discussions during and after the trial.

In its written request, Goya contends that Ross' testimony

[12] Arturo Ross' Petition to Revoke filed on December 22, 2010.

goes to its defense of estoppel against the Board's raising of this issue at this time and years after the fact. Goya also asserts that Ross' testimony would rebut expected testimony by the Acting General Counsel's witnesses and show that the discriminatees never mentioned the alleged statements by Goya and instead asked questions that would not have been asked if the discriminatee believed or was doubtful that the ALJ had already ruled or had ruled against him.

On January 4, 2010, the office of the Acting General Counsel issued a written response to Goya's December 28, 2010 request concerning the testimony of Ross. Citing the rationale and the supporting case law, Associate General Counsel Richard A. Siegel explained that absent a showing of most unusual circumstances, it is the policy of the Office of the General Counsel not to permit current or former Board agents to testify as witnesses with respect to the processing of unfair labor practice and representation cases. Associate General Counsel Siegel further clarified that Goya's request did not present a compelling basis to deviate from this longstanding policy. Specifically, Associate General Counsel Siegel pointed out that there were other witnesses such as Goya's negotiators and the employees themselves who would be able to testify regarding the settlement discussions occurring after the unfair labor practice trial.

With respect to the settlement discussions occurring during the trial, Associate General Counsel Siegel explained that witnesses other than Ross would be available to Goya. As far as Goya's defense of estoppel raised in the December 28, 2010 request, Associate General Counsel Siegel opined that there were also witnesses other than Ross that were available to Goya to assist in establishing the predicate of Goya's legal claim.

After addressing all of Goya's bases for requesting Ross' testimony, the Office of the Acting General Counsel concluded that the request for Ross' testimony did not present any unusual circumstances warranting a departure from the General Counsel's longstanding policy and denied the request to authorize Ross to testify at the scheduled hearing.

At the beginning of the trial, I gave the parties an opportunity to present their arguments concerning this issue. After due consideration of the parties' arguments, I granted the petitions to revoke Ross' subpoena. After counsel for the Acting General Counsel concluded her case, Goya requested that I reconsider my ruling on the grounds previously argued and also asserted that the testimony given was in direct contradiction to the proffer of Ross' testimony. I denied Goya's motion.

2. Whether there are unusual circumstances warranting Ross' testimony

Goya does not dispute that Rule 102.118(a)(1) prohibits the testimony of a current or former Board employee without the written consent of the Board or the General Counsel. Goya argues, however, that the Board and the courts have recognized this as creating a "limited" privilege. In support of this argument, Goya cites the decision of the Eighth Circuit Court of Appeals in *Stephens Produce Co., Inc. v. NLRB*, 515 F.2d 1373 (1975), in which the respondent claimed that it had been denied a fair hearing in a Board proceeding because it was not allowed to subpoena and question the Board field investigator who had conducted the initial investigation of the unfair labor practice charges. The court noted that there is a limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the Board. Id. at 1375. The court even went so far as to point out that the "mere incantation" of the policy precluding Board agent testimony is not always necessarily sufficient to bring the privilege into effect. The court further noted, however, that the respondent was given all of the witness statements pursuant to the "Jencks rule" 29 C.F.R. Section 102.118(b)(1) and the respondent was able to, and did, utilize these documents to cross-examine the Board's witnesses. The court was not persuaded by the respondent's argument that the witnesses made statements to the investigator that were inconsistent with the formal written statements. The court also opined that under the circumstances the respondent could assert nothing more than the mere surmise that Board witnesses had made earlier inconsistent statements which might be used to impeach them. With respect to the case before it, the court noted that while the asserted privilege is not a broad one and cannot be used indiscriminately to hide all nominally "investigative materials" from public scrutiny, "it takes something more than the mere hope or surmise that impeaching evidence will be found in the investigatory file or in the questioning of the agency investigator to overcome it." Id. at1377.

Goya argues that the "best and most cogent exposition of circumstances in which this limited privilege should not apply" is the court's decision in *Drukker Communications v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983). In *Drukker*, the employer and the union entered into a stipulation concerning the employees that were to be included in a collective-bargaining unit. The conference was not only attended by a Board agent, but the written stipulation was signed by the Board agent. The employer ultimately challenged the representative status of the union and asserted that the certification was invalid. The employer argued that a group of employees erroneously voted in the election because there was an oral understanding by the parties in conjunction with the stipulation that these employees would be excluded from the bargaining unit. The employer subpoenaed the Board agent who was present when the stipulation was signed. The administrative law judge denied the employer's motion to compel the Board agent's testimony and granted the General Counsel's motion to quash the subpoena. Goya points to the fact that upon review of the Board's decision, the court determined that the privilege was not applicable to the case.

While the court may have found the privilege inapplicable, the circumstances of the case were distinguishable from those in the present case. Finding that the testimony of the Board agent was central to the case, the court opined that if there had been an oral agreement, there would have been no basis to count the challenged ballots. Without the votes of the challenged ballots, the union would not have won the election, the certification would have been invalid, and there would have been no unfair labor practices in issue. The court noted that there was uncontradicted evidence that the Board agent participated in the process by assisting the parties to arrive at the stipulation. The court viewed his participation as a means to

ensure that the stipulation, properly understood, was worthy of the Board's approval, in order that he could recommend the stipulation. In finding that the privilege did not apply, the *Drukker* court also noted that the Board's leading case giving effect to an oral agreement varying the content of a stipulation for certification emphasized the fact that the agreement was made "in the presence of a "Board agent." *Banner Bedding, Inc*., 214 NLRB 1013, 1013–1014 (1974). Thus, while the testimony of the Board agent in *Drukker* was arguably central to the case before the Board and the court, Ross' testimony, as proffered, is not.

Goya asserts that Ross would testify that Turienzo contacted him before he signed the settlement and that Turienzo never told Ross that he had been told that there was a decision in his case or mentioned that Goya had told him anything regarding the case. Goya also asserts that Ross would testify that Turienzo asked him how he felt about the chances of success in the case. Goya asserts that Ross' testimony would discredit Turienzo's testimony. Unlike the circumstances viewed by the court in *Drukker*, Ross' testimony is not key to resolving the merits of this case. Assuming that Ross testified exactly as Goya proffered, such testimony would not provide the clear rebuttal of Turienzo's and Martin's testimony as Goya asserts. First of all, there is no dispute that the settlement agreement drafted by Goya's representatives provided for full confidentiality of the agreement. The agreement provided that Turienzo and Martin would "not disclose or discuss the terms of the Agreement or the circumstances related thereto with any other person." The only exception was their attorneys, accountant, or tax advisors. The record reflects that Turienzo or Martin did not show this document to any other person. Although Goya might make the argument that Ross could have served as an "attorney" within the meaning of the settlement agreement, there is no basis for such argument. While Ross may have represented the General Counsel in the earlier trial, he did not, and could not, personally represent these discriminatees in a private settlement agreement.

Assuming that Turienzo contacted Ross, as asserted by Goya, the proffer does not include any assertion that Turienzo divulged any terms of the agreement or shared anything about the discussions with Goya. Interestingly, Goya's proffer does not assert that Turienzo disclosed some of settlement discussions, but not others. The proffer simply asserts that Turienzo disclosed nothing about the circumstances of the settlement, which is fully consistent with the terms of the settlement agreement. There is no reason to believe that Turienzo did not understand the provision of the settlement that prohibited disclosure of the terms or circumstances. Keeping with that provision, he would not have been allowed to disclose to Ross any details of the settlement agreement or the discussions surrounding the agreement.

Goya asserts that Turienzo asked Ross his opinion about the success of the case. Goya asserts that Turienzo would not have done so if Goya had already told him that the Union lost the case. Francisco and Robert Unanue testified that Turienzo took the lead in initiating the settlement and even offered some of the terms of the settlement. As I have indicated above, I do not find this testimony credible. Nevertheless, assuming that Turienzo was proactive as depicted by Francisco and Robert Unanue, it is also reasonable that he was aware that the Board process did not stop with the ALJ decision. Even though he had been told that the Union lost the case before the ALJ, it is reasonable that he may have sought Ross' opinion as to the ultimate success of the case as it proceeded through the Board process. As it turns out, the ALJ decision was not the final action in this case and the case continued to be unresolved through the Board process and even after the court's decision. Despite the court's decision, the resolution of the case remains in issue as evidenced by this compliance proceeding.

Furthermore, there is no basis to conclude that Turienzo would have shared with Ross all the details or even a significant number of details about his conversations with Goya. Thus, Ross' testimony that Turienzo failed to mention the ALJ decision does not establish that the decision was not mentioned by Goya. As I noted in my earlier ruling at hearing, Goya seeks to prove a negative through Ross' testimony. The premise of Goya's argument is that the failure of Turienzo to disclose his discussions with Francisco and Robert Unanue must prove that they did not tell him that the case had been lost before the ALJ. This premise is flawed.

In its decision in *Sunol Valley Golf & Recreation Co*., 305 NLRB 493, 495 (1991), the Board reversed the judge's ruling with respect to a subpoena that was served by both the respondent and the charging party on a Board agent. In balancing the policy reasons for not involving Board employees as witnesses in Board litigation, the Board found that balance weighed against requiring the agent to testify. In determining this balance, the Board noted the "mere speculation" related to the Board agent's testimony. In the instant case, Goya asserts that Ross' testimony would discredit Turienzo and prove that Francisco and Robert Unanue did not make statements attributed to them by Turienzo. Because Ross was not a party to the settlement and did not participate in any of the settlement discussions, such a premise can be nothing more than mere speculation and insufficient for me to make a finding of fact.

Furthermore, Ross' testimony is irrelevant with respect to Goya's argument that the Acting General Counsel is estopped from raising this issue at this time. It appears that Goya's argument is based upon the hypothesis that if Board Attorney Ross knew that Goya entered into a private settlement agreement in 2000, the Acting General Counsel is now estopped from opposing the validity of the settlement agreements. I do not find this argument to be persuasive.

The Board has previously rejected the argument that the General Counsel or the Board is estopped from processing the allegations of a complaint because the respondent acted on advice received from Board agents in the Board's Regional Office. *Capitol Temptrol Corp*., 243 NLRB 575 fn. 59 (1979), enfd. 622 F.2d 574 (2d. Cir. 1980). In response to an analogous estoppel argument, the Board has also determined that it is not bound by informal or personal advice received by respondents from Board agents, especially when employee rights are violated pursuant to that advice. *Stokely-Van Camp, Inc.,* 130 NLRB 869, 871 (1961). Thus, assuming that Ross was informed of the private settlements on or about the time they were executed, such knowledge does not bind the Acting Gen-

eral Counsel or prevent the opposition to these private settlement agreements. The Board has already ordered Goya to reinstate Turienzo and Martin and to pay them backpay for the period from their unlawful discharges until they are offered reinstatement. The decision of the Board was affirmed by the United States circuit court of appeals. Goya has declined to follow either the Board or the court order. Ross' knowledge or lack of knowledge in 2000 cannot constitute a waiver of Goya's responsibility under the Act or as a waiver of these discriminatees' rights under the Act. Accordingly, Ross' testimony in this regard is not relevant.

Having heard the testimony in its entirety, I do not find unusual circumstances that warrant the testimony of Ross.

Therefore, on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

IT IS HEREBY ORDERED that Goya Foods Inc., d/b/a Goya Foods of Florida, Miami. Florida, its officers, agents, successors, and assigns, shall take the following actions:

1. Immediately offer Alberto Turienzo and Jesus Martin reinstatement to their former positions or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

2. Pay Alberto Turienzo the remaining net backpay owed to him and other reimbursable sums for the period of time from his unlawful discharge on July 7, 1999, until the date of a valid offer of reinstatement, less the $22,000 paid to him on October 31, 2000.

3. Pay Jesus Martin the remaining net backpay owed to him and other reimbursable sums for the period of time from his unlawful discharge on July 7, 1999, until the date of a valid offer of reinstatement, less the $25,000 paid to him on October 4, 2000.

Dated, Washington, D.C. March 21, 2011